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IN THE
Supreme Court of the United States
October Term, 1967
No. 508

THELMA LEVY, in her capacity as administratrix of the succession of LOUISE LEVY and as the tutrix of and on behalf of the minor children of LOUISE LEVY, said children being: RONALD BELL, REGINA LEVY, CECILIA LEVY; LINDA LEVY, and AUSTIN LEVY.

—v.—

The STATE OF LOUISIANA through the CHARITY HOSPITAL OF LOUISIANA at NEW ORLEANS BOARD OF ADMINISTRATORS and W. J. WING, M.D. and A.B.C. INSURANCE COMPANIES.

ON APPEAL FROM THE SUPREME COURT OF LOUISIANA

**MOTION FOR LEAVE TO FILE BRIEF AMICUS
CURIAE AND ACCOMPANYING BRIEF**

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ON APPEAL FROM THE SUPREME COURT OF LOUISIANA

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States.

The undersigned as counsel for and on behalf of the NAACP Legal Defense and Educational Fund, Inc., and the National Office for the Rights of the Indigent, respectfully move this Honorable Court for leave to file the accompanying brief as *Amicus Curiae*. Consent has been given by counsel for appellants and counsel for all parties on appellee's side, except the State of Louisiana which denied its consent. Documentation concerning such consent accompanies this brief.

The N.A.A.C.P. Legal Defense and Educational Fund, Inc. was organized 27 years ago for the purpose of securing equality before the law, without regard to race, for all

citizens. For many years, it has been the principal organization regularly supplying legal services to secure the civil rights of Negro citizens. As the majority of Negro citizens continued to relocate from the South to the North, and from rural to urban areas, they were confronted typically not with official state-sanctioned segregation, but with disabilities which attach to low-income status. Effective protection of the legal rights of Negro citizens therefore could only be secured by expanding the concern of the Fund to the rights of indigents including not only Negroes but members of all other groups that constitute the poor.

Under grant from the Ford Foundation, the Legal Defense Fund incorporated the National Office for the Rights of the Indigent (N.O.R.I.). The new organization is directing itself to those issues of law which have a substantial effect on the rights and protections accorded to poor persons. N.O.R.I. is engaging in legal research and litigation (by providing counsel for parties, as *amicus curiae*, or co-counsel with legal aid organizations) in cases in which rules of law may be established or interpreted to provide greater protection for the indigent.

The precise issue of this case is limited to whether five dependent illegitimate children will recover in tort for the wrongful death of their mother under a statute which would allow such recovery to legitimate children. More broadly, however, the question is whether, consonant with the Fourteenth Amendment to the United States Constitution, the criterion of *illegitimacy* may be used as the basis for classification under a state "welfare" law. Finally, the question is whether classification by the criterion of illegitimacy, which appears to be racially neutral on its face, is an instance of covert *racial discrimination* because it does in fact operate far more severely upon Negroes as a class than it does upon whites. This covert discrimina-

tion comes about by reason of the fact that disproportionately more Negro children than white children are born out of wedlock and a very high percentage of white illegitimate children are adopted, thereby achieving status under the Wrongful Death Act with regard to their adoptive parents, whereas nearly no Negro children find adoptive parents.

This case may have broad significance for urban populations as a whole and Negro communities in particular, within and outside of the State of Louisiana. Petitioners, therefore, wish to bring before this Court broader ramifications of this case which may not be of immediate importance to either of the parties.

WHEREFORE, petitioners pray that they be permitted to file the accompanying brief *amicus curiae* with this Court.

Respectfully submitted,

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ON APPEAL FROM THE SUPREME COURT OF LOUISIANA

BRIEF *AMICUS CURIAE*

For the NAACP Legal Defense and Educational Fund, Inc. and the National Office for the Rights of the Indigent.

Statement of Interest

This brief *amicus curiae* is submitted with the consent of counsel for appellant and counsel for all parties on appellee's side, except the State of Louisiana which denied its consent. Documentation concerning such consent accompanies this brief.

The N.A.A.C.P. Legal Defense and Educational Fund, Inc. was organized 27 years ago for the purpose of securing equality before the law, without regard to race, for all citizens. For many years, the Fund has been the principal

organization regularly supplying legal services to secure the civil rights of Negro citizens. As the majority of Negro citizens continued to relocate from the South to the North, and from rural to urban areas, they were confronted typically not with official state-sanctioned segregation, but with disabilities which attach to low-income status. Effective protection of the legal rights of Negro citizens therefore could only be secured by expanding the concern of the Fund to the rights of indigents including not only Negroes but members of all other groups that constitute the poor.

Under grant from the Ford Foundation, the Legal Defense Fund incorporated the National Office for the Rights of the Indigent (N.O.R.I.) which is directing itself to issues of law with substantial effect on the rights and protections accorded to poor persons. N.O.R.I. is engaging in legal research and litigation (by providing counsel for parties, *amicus curiae*, or co-counsel with legal aid organizations) in cases in which rules of law may be established or interpreted to provide greater protection for the indigent.

The precise issue of this case is limited to whether five dependent illegitimate children will recover in tort for the wrongful death of their mother under a statute which would allow such recovery to legitimate children. More broadly, however, the question is whether, consonant with the Fourteenth Amendment to the United States Constitution, the criterion of *illegitimacy* may be used as the basis for classification under a state "welfare" law. Finally, the question is whether classification by the criterion of illegitimacy, which appears to be racially neutral on its face, operates far more severely upon Negroes as a class than it does upon whites. This covert discrimination comes about by reason of the fact that disproportionately more Negro children than white children are born out of wedlock and a very

high percentage of white illegitimate children are adopted, thereby achieving status under the Wrongful Death Act with regard to their adoptive parents, whereas nearly no Negro children find adoptive parents.

This case will have broad significance for urban populations as a whole and Negro communities in particular, within and outside of the State of Louisiana. Petitioners, therefore, wish to bring before this Court broader ramifications of this case which may not be of immediate importance to either of the parties.

Opinions Below — Statute Involved

The opinions below and the statute involved are set out in the brief of the appellants.

Question Presented

Whether, consonant with the Fourteenth Amendment to the United States Constitution, the criterion of *illegitimacy* may be used as the basis for classification under a state "welfare" law.

More precisely, the question is whether the Wrongful Death Act of Louisiana, Civil Code Article 2315, as interpreted by the Louisiana courts to deny to illegitimate children, but to allow to legitimate children, an action for the wrongful death of their mother, solely on the basis of birth in or out of wedlock, is unconstitutional and therefore invalid under the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the Constitution of the United States.

Statement of the Case

The summary that follows is based on the Statement of the Case and Opinion Below in appellant's Jurisdictional Statement, pp. 4-6.

Appellant brought this action under LA. CIV. CODE art. 2315 on behalf of the five minor children of the late Louise Levy for her wrongful death. The defendants were the State of Louisiana, through the Charity Hospital of New Orleans Board of Administrators and W. J. Wing, M.D., and the ABC Insurance Companies, later designated as the Interstate Fire and Casualty Company (R. 5-9, 37).

The Third Supplemental and Amending Petition, whose allegations must be taken as true for the purposes of this appeal, stated that the five illegitimate children of Louise Levy lived with her, and she treated them as well as any mother would treat her legitimate children. She worked as a domestic servant to support them and either took them or had them taken to Catholic Mass every Sunday. In addition, she had them enrolled in a parochial school at her own expense, even though she could have sent them to the free public school (R. 50-52).

As alleged in the petition, on March 12, 1964, Louise Levy came to the Charity Hospital in New Orleans with symptoms of tiredness, dizziness, weakness, chest pain and slowness of breath. Dr. Wing, to whom she was assigned, purportedly examined her, but failed to take her blood pressure, make a proper check of her eyes or conduct any other test, such as urinalysis, which would have revealed her condition. He then sent the patient home with tonic and tranquilizers. She returned on March 19 with severe symptoms. Dr. Wing merely looked at her, told her that she was not taking the medicine, and made an appointment for her to see a psychiatrist on May 14. On March 22 she

was brought to the hospital in a comatose condition, when adequate examination resulted in the correct diagnosis of hypertension uremia. She died on March 29, 1964 (R. 5-9).

Dr. Wing and the Interstate Fire and Casualty Company moved to dismiss the petition on the grounds that petitioner had not qualified as tutrix, and that Article 2315 allowed no cause or right of action as to illegitimates (R. 20-21). The procedural issue was cleared by appellant's qualification as tutrix in separate proceedings. The District Court then rendered judgment in favor of the defendants and the suit was dismissed (R. 66-67). On appeal, the Court of Appeal affirmed on the ground that illegitimate children have no cause of action for the wrongful death of their mother and stated that "[d]enying illegitimate children the right to recover in such a case is actually based on morals and general welfare because it discourages bringing children into the world out of wedlock." The Court of Appeal specifically rejected appellant's claim that the denial of a cause of action under Article 2315 deprived the children of due process and equal protection under the Fourteenth Amendment (R. 112-115): "Since there is no discrimination in the denial of the right of illegitimate children to recover based on race, color, or creed, we can find no basis for the contention of unconstitutionality, and can find no jurisprudence of our courts to such effect." Appellant petitioned the Supreme Court of Louisiana for a writ of *certiorari* on constitutional grounds. The Supreme Court denied the writ, finding "no error of law in the judgment of the Court of Appeal" (R. 116). This Court has noted probable jurisdiction. *Levy v. Louisiana*, — U.S. —, 88 S.Ct. 290 (1967).

Summary of Argument

"Distinctions between citizens solely because of their ancestry are odious to a free people whose institutions are founded upon the doctrine of equality." *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943); *Loving v. Virginia*, 388 U.S. 1, 11 (1967). Whether discrimination on the basis of ancestry rests upon the parents' color, creed, nationality, religion or marital status, it offends the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the United States Constitution.

Furthermore, the Louisiana statute under review discriminates on the basis of race. As developed in detail below, 95.8 percent of all persons affected by discrimination against illegitimates under the statute are Negroes. This means that, for practical purposes, the classification of illegitimacy as used under the Louisiana Wrongful Death Act is a euphemism for discrimination against Negroes.

The demand of the Fourteenth Amendment applies with particular force to a state "welfare" law, such as the Louisiana Wrongful Death Act here under review. Not only is there no rational regulatory purpose which justifies the discrimination against illegitimates imposed under the Wrongful Death Act, but the very purpose of the Wrongful Death Act, which is to provide compensation for the tortious loss of support, is thwarted by the capricious denial of recovery to the illegitimate.

The precise issue of the case is narrowly limited to the right of dependent illegitimate children to recover for the death of their mother under a statute which would allow such recovery to legitimate as well as adoptive children. However, the broader implications of this case point to a whole range of anachronistic discriminations imposed by

our legal system on the person of illegitimate birth.¹ As shown by the statistics on illegitimate birth rates, this discrimination hits hardest in the poorest groups of our society, it is imposed most severely on those least able to afford or combat it.

ARGUMENT

I.

Denial of Equal Protection.

The Equal Protection Clause does not forbid "unequal laws" and does not require every law to be equally applicable to all individuals. *Barbier v. Connolly*, 113 U.S. 27, 31-32 (1885). Of necessity, classification must be permitted; otherwise there could be no meaningful legislation. The question that this Court has asked under the Fourteenth Amendment is whether a given piece of legislation operates "equally" upon all members of a group that is defined reasonably and in terms of a proper purpose.

To show that legislation discriminating against the illegitimate applies equally to all illegitimates, regardless of race, color, nationality, sex or creed proves nothing concerning the validity of such legislation. *Cf. Loving v. Virginia, supra*. This disposes of the fundamental misunderstanding of the meaning of the Fourteenth Amendment expressed in the Louisiana court's opinion here under review, to the effect that "since there is no discrimination in the denial of the right of illegitimate children to recover based on race, color or creed, we can find no basis for the conten-

¹ See, generally, Krause, *Bringing the Bastard into the Great Society—A Proposed Uniform Act on Legitimacy*, 44 *Tex. L. Rev.* 829 (1966); Krause, *Equal Protection for the Illegitimate*, 65 *Mich. L. Rev.* 477 (1967); Krause, *The Non-Marital Child—New Conceptions for the Law of Unlawfulness*, 1 *Fam. L. Q.* 1 (June, 1967).

tion of unconstitutionality." This holding of the Louisiana Court begged the question, which goes to the propriety of the criterion of *illegitimacy*.

Applying the equal protection test to the criterion of illegitimacy, it follows that state action denying to the illegitimate rights that are granted to those of legitimate birth is acceptable only if it is related to a proper public concern with respect to which legitimate and illegitimate children are *not* situated similarly. In order to test for equal protection purposes a law regulating the status of the illegitimate, its legislative purpose must be defined and evaluated. Long ago, in *Lindsley v. National Carbonic Gas Co.*, 220 U.S. 61, 78-79 (1911), this Court stated its traditional reluctance to interfere with state law where the equal protection clause is invoked to protect economic interests. While this reluctance has been likened to a presumption of constitutionality, this presumption is reversed where the "basic civil rights of man" are at issue. *Harper v. Virginia Board of Elections*, 383 U.S. 663, 669-70 (1966); McKay, *Political Thickets and Crazy Quilts: Redapportionment and Equal Protection*, 61 MICH. L. REV. 645, 666, 667 (1963); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1962). It is beyond question that a child's right to a familial relationship with his mother is more akin to a "fundamental right and liberty" or a "basic civil right of man" than to a mere economic interest. Although money is involved, the illegitimate's claim actually goes further, for it centers on his second-class status in our society—a society in which illegitimacy is a "psychic catastrophe"² and in which recovery in tort is granted for a false allegation of illegiti-

² "In the case of illegitimate birth the child's reactions to life are bound to be completely abnormal. . . . To be fatherless is hard enough, but to be fatherless with the stigma of illegitimate birth is a psychic catastrophe." Fodor, *Emotional Trauma Resulting From Illegitimate Birth*, 54 ARCHIVES OF NEUROLOGY AND PSYCHIATRY 381 (1945).

macy.³ Indeed, the psychological effect of the stigma of bastardy upon its victim⁴ seems entirely comparable to the damaging psychological effects upon the victims of racial discrimination.

³ The following is an abbreviated list of defamatory epithets compiled in a leading textbook on torts: "... immoral or unchaste, or 'queer' ... a coward, a drunkard, a hypocrite, a liar, a scoundrel, a crook, a scandal-monger, an anarchist, a skunk, a bastard, a eunuch ... because all of these things obviously tend to affect the esteem in which he is held by his neighbors." Prosser, *Torts* 757-58 (3rd ed. 1964). Of course, quite aside from the neighbors' esteem, an allegation of bastardy may be a serious matter in that it may dispute eligibility to inherit.

⁴ Jenkins, *An Experimental Study of the Relationship of Legitimate and Illegitimate Birth Status to School and Personal and Social Adjustment of Negro Children*, 64 *AM. J. SOCIOLOGY* 169 (1958), in which the author investigated whether there were significant differences in the "adjustment" of legitimate and illegitimate Negro school children. All children in the (unfortunately rather small) sample were recipients of Aid to Dependent Children's funds and otherwise lived in comparable economic and social circumstances. "Adjustment" was considered to be reflected in I.Q., age-grade placement, school absences, academic grades, teacher's rating, and personal and social adjustment as measured by the California test of personality. Jenkins reported that:

"Two primary patterns emerged in this study. First, the legitimate children rated higher in every area except school absences. . . .

The second discernible pattern was that the older groups of illegitimate children consistently made a poorer showing than the younger group, in comparison with the legitimate children. A possible explanation for this is that, as these children grow older and are able to internalize fully the concept of illegitimacy and as they become increasingly aware of their socially inferior status, their adjustment to self and society may become progressively less satisfactory." *Id.* at 173.

II.

Evaluation of the Relationship Between the Discrimination Against Illegitimates Imposed Under the Louisiana Wrongful Death Act and the Act's Regulatory Purposes.

Discrimination against the illegitimate is rooted so deeply in our culture that legislative enactments on illegitimacy are generally silent as to legislative purpose. Accordingly, the Louisiana statute does not reveal a reason why illegitimates should be excluded from its beneficial operation. Indeed, the Louisiana statute itself does not refer to illegitimate children at all, but has been construed by the Louisiana courts to harbor this discrimination in the reference to "children," which is specifically defined to include adopted children. The history and origin of the line of Louisiana decisions that imposed this discrimination is reviewed and analyzed below. First, however, we should consider the argument employed by the Louisiana Court in the decision under review to the effect that "Denying illegitimate children the right to recover in such a case is actually based on morals and general welfare because it discourages bringing children into the world out of wedlock."⁵ This argument is bogus.

There is of course no question that the state may properly regulate many aspects of sexual conduct. However, even if the purpose of discouraging sexual intercourse outside of marriage is entirely valid, a connection must be established between this purpose and the statute, between the status of the illegitimate child under the Wrongful Death Act and his mother's conduct. The only connection, if one exists, lies in the expectation that potential parents will be so concerned about the treatment that awaits their

⁵ See Statement of the Case, *supra*.

illegitimate child at the hands of the law that they will refrain from illicit conduct. First, a causal connection seems to be lacking because the rapidly rising rate of illegitimate births⁶ indicates that laws discriminating against illegitimate children do not affect their parents' sexual conduct.

Second, and more importantly, this supposed rationale raises the question *whether a law may properly penalize one in order to evoke guilt feelings in another whose conduct is to be affected*. Merely to ask the question in this form is to answer it. "In a series of decisions this Court has held that even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose." *Shelton v. Tucker*, 364 U.S. 479, 488 (1960).⁷ If the state wishes to discourage casual unions, it should do so directly,

⁶ U. S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES 47, 51 (1965) shows a total of 4,098,000 live births, and 259,400 illegitimate live births for 1963. See also Campbell and Cowhig, *The Incidence of Illegitimacy in the United States*, 5 *Welfare in Review* 1, 4 (No. 5, May 1967), who show the following table:

| | 1940 | 1957 | 1965 |
|---|--------|---------|---------|
| Number of illegitimate births | 89,500 | 201,700 | 291,200 |
| Illegitimate births per 1,000 unmarried women 15-44 years old (illegitimacy rate) | 7.1 | 20.9 | 23.4 |
| Illegitimate births per 1,000 births (illegitimacy ratio) | 37.9 | 47.4 | 77.4 |

⁷ Cf. *Aptheker v. Secretary of State*, 378 U.S. 500, 508 (1964) (citations omitted): "It is a familiar and basic principle, recently reaffirmed in *NAACP v. Alabama* . . . , that a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms."

as for example, by punishing fornication⁸ or by providing incentives for marriage,⁹ rather than by penalizing a group that cannot prevent the mischief against which the law is directed. This Court has held that the status of parents may not be the basis for placing burdens and disabilities

⁸ It would not do to punish the parents for the illegitimate birth of the child because, whether the punishment consisted of a fine, a jail sentence, or the denial of welfare benefits, the child ultimately bears much or most of the burden of such punishment. Consider the Louisiana picture in this regard: Since 1960, LA. REV. STAT. 14:79.2 provides as follows: "Conceiving and giving birth to two or more illegitimate children is hereby declared to be a crime. Both the father and the mother of such children shall be equally guilty of the commission of this crime. Each such birth shall be a separate violation hereof. A birth certificate showing a child to be illegitimate shall be prima facie proof of that fact. Whoever commits the crime of conceiving and giving birth to two or more illegitimate children shall be fined not more than one thousand dollars, or imprisoned for not more than one year, or both." This type of legislation is not limited to Louisiana, but has found its way into other Southern states. Cf. MISS. CODE ANN. § 2018.6.1 (1964 Supp.). Also in 1960, Louisiana attempted to deny ADC benefits to each person "who is living with his or her mother if the mother has had an illegitimate child after a check has been received from the welfare department, unless and until proof satisfactory to the parish board of public welfare has been presented showing that the mother has ceased illicit relationships and is maintaining a suitable home for the child or children." LA. ACTS 1960, No. 251 § 1 at 527. In 1961, this "suitable home" requirement was ruled inconsistent with controlling Federal welfare laws. See Bell, AID TO DEPENDENT CHILDREN 142-48 (1965); Dorsen, ed., *Poverty, Civil Liberties, and Civil Rights: A Symposium*, at 331. Accordingly, the Louisiana statute was revised to deny benefits only to those illegitimate children whose mother "is the mother of two or more older illegitimate children." LA. REV. STAT. 46:223.

⁹ In the higher income brackets, the tax law presently provides some such incentive in the form of exemptions and income-splitting privileges. In the low-income brackets, however, the situation often is reversed, and many welfare arrangements actually discourage marriage and legitimacy. For example, a widow who remarries often will lose survivors or pension benefits derived through her first husband. Analogous problems arise under the ADC programs. In the lowest income groups the widespread unavailability of legal aid services that include family matters, such as divorce and legitimation, heavily contributes to the incidence of illegitimacy. Dorsen, ed., *Poverty, Civil Liberties, and Civil Rights: A Symposium, supra*; cf. Mr. Justice Douglas, dissenting, in *Hackin v. Arizona*, — U.S. —, 88 S.Ct. 325, 327-32 (1967).

on a child. *Oyama v. California*, 332 U.S. 633 (1948). Certainly, it follows that wrongful, perhaps criminal, acts by the mother here, can not justify the particular disability challenged by petitioners.

A careful search fails to disclose any other potential regulatory purpose that might support the statute. On the contrary, as will be discussed fully below, the evidence points in the direction of tragicomic historical accident. Thus, there is in illegitimacy cases no question concerning the mother's identity which is established by the fact of birth with the same certainty whether the birth takes place within or out of wedlock. If certain types of discrimination against the illegitimate may unpersuasively be supported on the ground that this protects the family as a moral, social institution,¹⁰ this argument fails wholly if there is no family involved. In the case of an action for the wrongful death of the mother, there is by definition no family to protect. Nor might one suppose that the illegitimate mother loved her children less by reason of their illegitimate status. Even if this were so, there would be no relevant relation between the mother's love and her children's right to recover from a tortfeasor for their mother's wrongful death. If these arguments seem far afield, no better arguments support the discrimination imposed under the Louisiana statute.

On the contrary, not only are there no rational reasons in favor of discriminating against illegitimates under the Louisiana statute, but good reasons favor the opposite result. What indeed is the purpose of the Wrongful Death Act? Its purpose is to rectify the injustice imposed by the old common law which held that tort actions died with the victim and which denied a person dependent on the

¹⁰ See Krause, *Equal Protection for the Illegitimate*, *supra* at 492-95.

victim to recovery from the tortfeasor for his loss of support.

This benefit inures not only to the person entitled to recover, but also relieves the public of a potential welfare burden—quite aside from the policy questions involved in letting a tortfeasor go free. It needs no elaboration that the question of the legitimacy status of children living with, dependent on and entitled to support from their mother who met a tortious death is wholly irrelevant with respect to these purposes. Indeed, the purposes of the statute under review actually would be served better if the action of the illegitimate claimant were allowed. In this connection it should be noted again that the Louisiana statute does *not* on its face discriminate against illegitimates, but that the courts have superimposed this interpretation upon the statute. It is significant that Louisiana's Workmen's Compensation Act, which is a similar "welfare" statute also intended to compensate for loss of support, has been interpreted to allow illegitimate children to recover for the death of even their *father*, if dependent on him and living in his household.¹¹

¹¹ LA. REV. STAT. § 23:1021(3). (1964) defines child as not including an illegitimate child unless acknowledged. However, § 23:1253 has been interpreted to allow the illegitimate child to recover as a dependent if living in the workman's household. The distinction is that since the illegitimate does not qualify under § 23:1021(3), he must prove his *dependency* upon the workman, whereas the legitimate who qualifies under § 23:1021(3) merely must prove that he lived with the workman from which fact his dependency would be presumed. In practical effect, this distinction is one without serious difference. See *Note*, 20 TUL. L. REV. 145 (1945). The Wrongful Death Act discrimination against the illegitimate met with the non-discriminatory interpretation of the Louisiana Workmen's Compensation Act in *Board of Comm'rs. v. City of New Orleans*, 223 La. 199, 65 So. 2d 313 (1954). Plaintiff had been the employer of deceased and sued to recover indemnification from the tortfeasor after being held liable to the illegitimate child of the deceased under the Workmen's Compensation Act. Defendant contended that the

In its 1965 amendments to the Social Security Act, Congress recognized that the purpose of welfare statutes is thwarted by discrimination against illegitimates and ended previous reliance on state law definitions of the term "child" and similar operative words which often had resulted in discrimination against illegitimates.¹²

III.

Historical Accident—The True Reason for the Discriminatory Interpretation of the Louisiana Wrongful Death Act.

How then may it be explained that the Louisiana courts have consistently interpreted the Wrongful Death Act against the illegitimate? Instead of being supported by a purpose that is rational in the light of this century, the basis for the discriminatory interpretation of the Louisiana statute lies in its history. The earliest case employing the rule was *Lynch v. Knopp*, 118 La. 611, 43 So. 151 (1907), in which a mother of an illegitimate child was denied recovery for the wrongful death of her child. The court stressed the

employer could not recover because the illegitimate child had no action under § 2315. The court acknowledged that the child would have no action under § 2315, but held that this did not bar the employer's suit against the defendant, because to obtain indemnification, under the Workmen's Compensation Act, the employer asserts the cause of action that arose originally in favor of the *employee* rather than that of the beneficiary under the Wrongful Death Act.

¹² In essence, the new section (64 Stat. 492 (1950), as amended, 42 U.S.C. § 416(h)(3) (1965)) provides that:

"an applicant will be considered the child of the worker if the worker (1) has acknowledged in writing that he is the child's father; (2) has been decreed by a court to be the child's father; (3) has been ordered by a court to contribute to the support of the child because he is the child's father; or (4) is shown by other evidence satisfactory to the Secretary to be the child's father and has been living with or contributing to the support of the child." S. REP. NO. 404, 89th Cong., 1st Sess. 267 (1965).

legal distinction between the inheritance rights of legitimate and illegitimate children and noted that, since the statute is in derogation of the common law (at common law the action of the deceased would not survive), it must be construed strictly and the term "child" limited to a legitimate child. This interpretation of the statute continues today, but now the Louisiana courts no longer search for reasons and mechanically apply the rule excluding illegitimates from the benefit provided under the Wrongful Death Act.¹³

Ironically, the French law after which the Louisiana Code was patterned not only had no equivalent to the common law rule under which tort actions died with the victim, but the basic tort provision of the French Code had been specifically interpreted to allow the tort right of action to survive the death of the victim *prior* to the adoption of the identical tort provision in Louisiana.¹⁴ *Erhard v. Uttwiller* [1809-1811], S. Jur. II 223 (Cour d'appel, Colmar, March 3, 1810); *Rolland v. Gosse* [1815-18], S. Jur. I 540 (Cass. civ. Nov. 5, 1818). For no discernible reason the Louisiana court rejected the French interpretation and instead adopted the common law view, holding that without a specific statute no action could lie for wrongful death. *Hubgh v. N.O. & C.R.R.*, 23 La. (6 La.

¹³ *Vaughan v. Dalton-Lard Lumber Co.*, 119 La. 61, 43 So. 926 (1907); *Landry v. American Creosote Works*, 119 La. 231, 43 So. 1016 (1907); *Sebostris Youchican v. Texas & P. Ry.*, 147 La. 1080, 86 So. 551 (1920); *Green v. New Orleans S & G.I.R. Co.*, 141 La. 120, 74 So. 717 (1917); *Navarrette v. Joseph Laughlin, Inc.*, 20 So. 2d 313 (La. Ct. App. 1944), reversed on other grounds, 209 La. 417, 24 So. 2d 672 (1946); *Thompson v. Vestal Lumber & Mfg. Co.*, 208 La. 83, 22 So. 2d 842 (1945); *Evans v. United States*, 100 F. Supp. 5 (W.D. La. 1951); *Board of Comm'rs. v. City of New Orleans*, *supra* n. 11; *Jackson v. Lindlom*, 84 So. 2d 101 (La. Ct. App. 1955); *Benjamin v. Hardware Mutual Casualty Co.*, 244 F. Supp. 652 (W.D. La. 1965); *Glonn v. American Guaranty & Liability Insurance Company et al.*, 379 F.2d 545 (5th Cir. 1967).

¹⁴ The basic French torts provision, CODE CIVIL art. 1382, was taken over into Louisiana law as the first sentence of LA. CIV. CODE art. 2315.

Ann.) 495, 496-97, 54 Am. Dec. 565, 567 (1851). In response to this interpretation, Louisiana added to its law the predecessor statute to its current Wrongful Death Act. See Voss, *The Recovery of Damages for Wrongful Death at Common Law, at Civil Law, and in Louisiana*, 6 TUL. L. REV. 201, 221 (1932). But French law indirectly came back in the interpretation that was later given the Wrongful Death Act which discriminated against the illegitimate with regard to his relation with his natural *mother*. While a number of wrongful death statutes in other states discriminate against illegitimates insofar as recovery for the wrongful death of the *father* is concerned, the illegitimate child's relation to its *mother* usually is legally complete upon birth. Discrimination with respect to the mother's relation to her child is unique to Louisiana law,¹⁵ and apparently, came to Louisiana from French law. While nearly all other legal systems base the legal relationship between mother and illegitimate child on the fact of birth, French and Louisiana law to this day require that maternity be formally established by the mother's acknowledgment or by a maternity suit. See Savatier, *L'évolution de la condition juridique des enfants naturels en droit français* 37, 41-42 in Dabin, *LE STATUT JURIDIQUE DE L'ENFANT NATUREL* (1965). Lasok, *Legitimation, Recognition and Affiliation Proceedings*, 10 INT. & COMP. L. Q. 123, 127-28 (1961); Cf. LA. CIV. CODE arts. 203, 241 (1) (Slovenko 1961).¹⁶ The confusion is total because French law itself *does*

¹⁵ The Georgia Wrongful Death Act was amended in 1960 to allow a dependent, illegitimate child to recover for the wrongful death of his mother. GA. STAT. ANN. § 105-1306 (Supp. 1966).

¹⁶ The peculiar French requirement of formal *maternal* acknowledgment dates from the time of Henri IV who, to discourage a wide-spread practice of child abandonment and substitution, ordered that maternity be specifically established. See Müllner-Freienfels in 2 VERHANDLUNGEN DES VIERUNDVIERZIGSTEN DEUTSCHEN JURISTENTAGES, Sitzungsberichte at C105 (1964).

allow the illegitimate to recover for the wrongful death of his mother and even his father. *Min. publ. et cons. Scherriff v. Sansen* [1954] D. Jur. 176 (Cour d'appel, Douai, Dec. 10, 1953); *Beinheir Ben M'Bark et Cie v. Dame Bousquet* [1954], D. Jur. 777 (Cour d'appel, Rabat, Nov. 12, 1954). See 1 Mazeaud and Tunc, *TRAITÉ THÉORIQUE ET PRATIQUE DE LA RESPONSABILITÉ CIVILE DELICTUELLE ET CONTRACTUELLE* 372 *et seq.* (5th ed. 1957).

IV.

Racial Discrimination.

In addition to the overt discrimination on the basis of the criterion of illegitimacy, the Louisiana Wrongful Death Act covertly discriminates on the basis of race. While the statute employs no racial criterion on its face, it operates far more severely upon Negroes as a class than it does upon whites. This covert discrimination comes about in two ways. First, disproportionately more Negro children than white children are born out of wedlock.¹⁷

¹⁷ Nationally, in 1963, the Vital Statistics Division of the Public Health Service, U.S. Department of Health, Education and Welfare, estimated that the white illegitimacy rate was 30.7 per 1,000 live births; the non-white rate was 235.9. (While the non-white classification includes Orientals, Indians and Negroes, Negroes so predominate numerically (more than 90%) that the non-white classification reflects the Negro figure with reasonable accuracy. U.S. Bureau of the Census, *Statistical Abstract of the United States* 28 (1967).) See United States Department of Labor, Office of Policy Planning and Research, *The Negro Family The Case for National Action* (hereafter referred to as *The Moynihan Report*) 8-9, 59. By 1965, the white rate was 39.6 and the Negro rate was 263.2 per thousand live births. *U.S. News and World Report*, Oct. 2, 1967 at 84. These figures drastically understate the problem, for among the impoverished urban Negroes the illegitimacy rate has been rising much faster than it has risen nationally. In the District of Columbia, the illegitimacy rate for non-whites grew from 21.8 percent in 1950, to 29.5 percent in 1964. *The Moynihan Report* at 9. In impoverished areas of the District the 1963 rate was 38 percent. *Id.* at 70. In Harlem, the

In *Louisiana* in 1965, the U.S. Department of Health, Education and Welfare reported, 8,276 illegitimate children were born to Negroes and 1,158 were born to whites. *U.S. News and World Report*, Oct. 2, 1967 at 85.

The second and even more important reason that makes the statute disproportionately more burdensome for Negroes than for whites is that a high percentage (70%) of white illegitimate children are adopted and thereby achieve status under the Wrongful Death Act, at least with regard to their adoptive parents, whereas very few (3-5%) Negro illegitimates find adoptive parents.¹⁸

Griffin v. County School Board, 377 U.S. 218 (1964), involved a comparable point because, on its face, the closing of the public schools of Prince Edward County to white and Negro children was not discriminatory. However, this Court unanimously held the school closing "to deny colored students equal protection of the laws" because "(c)losing Prince Edward's schools bears more heavily on Negro children in Prince Edward County since white children there have accredited private schools which they can attend while colored children until very recently have had no available private schools, and even the school they now attend is a temporary expedient." If the uneven numerical incidence of illegitimacy among Negroes and whites in itself pro-

non-white illegitimacy rate in 1963 was more than 43 percent. *Id.* at 19. In some areas of Chicago, the illegitimacy rate stands at 38 percent. *Champaign-Urbana [Illinois] News Gazette*, Feb. 14, 1966, p. 13.

¹⁸ "Of an estimated 2.5 million surviving children registered as illegitimate at birth from 1940 through 1957, 1 million were white and 1.5 million, nonwhite. . . . Possibly as many as 70 percent of all white illegitimate children are given for adoption, but only between 3 and 5 percent of the nonwhite illegitimate children are adopted. Some children are legitimated through marriage of their parents. Although no estimate is available the number is believed to be too small to affect the percentage distribution." U. S. Department of Health, Education and Welfare, *Illegitimacy and its Impact on the Aid to Dependent Children Program* 35-36 (1960).

vides a reasonable analogy, the fact that that adoption facilities are open and widely utilized by white illegitimates improves the analogy. The analogy is perfected by a Louisiana statute which forbids interracial adoption and thereby closes to Negroes, solely on the ground of race, one method of escape from the discrimination under the Wrongful Death Act. *La. Rev. Stat.* 9:422. The combination of this statute with the wrongful death statute in question here denies equal protection of the laws in violation of the Fourteenth Amendment.

Applying the national percentage on white adoptions (70%) and non-white adoptions (4%) to the 1965 Louisiana illegitimacy figures (1,158 white, 8,276 Negro); only 347 white children remain unadopted, whereas 7,945 Negro children remain unadopted. *This means that 95.8 percent of all persons affected by the operation of the Louisiana Wrongful Death Act, are Negroes.* For all practical purposes this means that the criterion of *illegitimacy* as used under the Louisiana Wrongful Death Act is synonymous with a *racial* classification.

It is not contended, of course, that the construction of the Louisiana statute against illegitimates, at least in its inception, had a racially discriminatory intent. Nor is it contended that a statute which happens to fall most heavily upon one particular group is for that reason alone unconstitutional. However, this Court need not ignore the fact that Louisiana is a Southern state with a long history of racial discrimination and that the operation of the Wrongful Death Act, if accidentally, fits perfectly into a pattern of legislation which often is only a thinly disguised cover for racial discrimination. For example, in 1960 Louisiana amended its constitution to deny the right to vote in federal and state elections for a period of five

years after the birth of an illegitimate child, to both parents of an illegitimate child. Louisiana Constitution, art. 8, §§1(5), (6).¹⁹

V.

Due Process.

The interpretation given the Wrongful Death Act by the Louisiana courts also violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Much of the above discussion under the Equal Protection Clause and specifically the inquiry into the purposes of the Louisiana statute, is applicable under the Due Process Clause as well. Suffice it to add here that if *Loving v. Virginia*, *supra*, held that the miscegenation statute was invalid under the Due Process Clause because "the freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men," a child's right to a legally recognized relationship with his own mother should be considered a still more "basic civil right of man" than the right to marry. See *Griswold v. Connecticut*, 381 U.S. 479, 492 (1965).

In this connection, it is relevant to observe how other civilized nations approach the problems created by centuries of discrimination imposed on the person of illegitimate birth. *Cf. Wolf v. Colorado*, 338 U.S. 25 (1948).

¹⁹ See *supra*, note 8. *Cf. Willie Earl Carthan v. State Board of Education*, Civil Action No. 3814, United States District Court, Southern District of Mississippi, Jackson, Mississippi Division, in which a temporary injunction was issued against the enforcement of a state statute which, by assessing a tuition fee, sought to exclude from the public school system children who were not living with their natural parents. This was disproportionately oppressive of the Negro community because considerable numbers of parents had migrated to Northern communities and had left their children behind with relatives.

The illegitimate's demand for a measure of equality increasingly is being recognized as a basic human right. In January, 1967, a subcommission of the Commission on Human Rights of the United Nations adopted a statement on "General Principles on Equality and Non-Discrimination in Respect of Persons Born Out of Wedlock" which demands that "every person, once his filiation has been established, shall have the same legal status as a person born in wedlock."²⁰ This effort in the United Nations reflects active and extensive movements toward reform of the law of illegitimacy that are under way in many countries. For example, the Scandinavian countries have long granted substantially equal rights to the illegitimate.²¹ In 1915, *Norwegian* law set the pace by establishing substantial equality for the illegitimate child in his legal relationship to his mother and father. The early statute was superseded by the Norwegian Law of December 21, 1956, concerning children born out of wedlock which abolished nearly all remaining legal distinctions between legitimate and illegitimate children.²² [1956, Part 2] *Norsk Lovtidend* 882, No. 10. The *Danish* Law of May 18, 1960, concerning the rights of children broadly deals with the rights of legitimate and illegitimate children and does not distinguish between them.²³ Among other things, it provides an equal right of support and very effective means to ascertain

²⁰ Sub-Commission on Prevention of Discrimination and Protection of Minorities of the Commission on Human Rights, United Nations Economic and Social Council, *Study of Discrimination against Persons Born out of Wedlock: General Principles on Equality and Non-Discrimination in Respect of Persons Born out of Wedlock*, U.N. Doc. E/CN. 4 Sub. 2/L. 453 (13 Jan. 1967).

²¹ See Danish Committee on Comparative Law, *DANISH AND NORWEGIAN LAW* 55 (1963).

²² See Arnholm, *New Norwegian Legislation Relating to Parents and Children*, in 3 *SCANDINAVIAN STUDIES IN LAW* 11, 12-20 (1959).

²³ See Marcus, *Das neue dänische Kindergesetz*, 26 *RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT* 51 (1966).

paternity. [1960, Part A] *Lovtidende* 603, No. 200. The Swedish Law of June 10, 1949, concerning the legal situation of parents did not go quite as far, but does provide an equal right of support for the illegitimate child. [1949] *Författningssamling* 729, No. 381.

The 1949 Constitution of *West Germany* contains the following provision: "Illegitimate children shall, through legislation be given the same conditions for their physical and spiritual development and their position in society as legitimate children." German Fed. Rep. Const. art. VI (5). To comply with this constitutional requirement the German Ministry of Justice has drafted a reform proposal which presently is under active consideration.²⁴ *Referentenentwurf eines Gesetzes über die rechtliche Stellung der unehelichen Kinder* (Unehelichengesetz) Bundesjustizministerium, Bonn 1966. Similarly, the *Austrian* government has proposed a bill that would realize substantial equality.²⁵ *Regierungsentwurf eines Bundesgesetzes über die Neuordnung der Rechtsstellung des unehelichen Kindes*, dated June 16, 1965, No. 763 der Beilage zu den stenographischen Protokollen des Nationalrates X.GP. In *Switzerland* the report of an official committee proposes substantially improved means of ascertaining paternity of illegitimates and offers inheritance rights with respect to the father.²⁶ *Bericht der Studienkommission für die Teilrevision des Familienrechts*

²⁴ See Knöpfel, *Der Referentenentwurf eines Gesetzes über die rechtliche Stellung der unehelichen Kinder*, 13 ZEITSCHRIFT FÜR DAS GESAMTE FAMILIENRECHT 273 (1966); Müller-Freienfels, *Das Recht des ausserehelichen Kindes und seine Reform*, in von Caemmerer and Zweigert, DEUTSCHE LANDESREFERATE ZUM VII. INTERNATIONALEN KONGRESS FÜR RECHTSVERGLEICHUNG IN UPPSALA 1966 149 (1967).

²⁵ See Gschnitzer, *Grundsätzliches zur Neuordnung der Rechtsstellung des unehelichen Kindes*, 88 JURISTISCHE BLÄTTER 393 (1966).

²⁶ See Hegnauer, *Die Revision der Gesetzgebung ueber das aussereheliche Kindesverhältnis*, New Series 84 Part 2 ZEITSCHRIFT FÜR SCHWEIZERISCHES RECHT 1, 36 (1965).

(*Ausserehelichen-, Adoptions - und Ehegüterrecht*) erstattet dem Eidgenössischen Justiz - und Polizeidepartment am 6/13/1962 (mimeographed).

In Great Britain, the *Report of the Committee on the Law of Succession in Relation to Illegitimate Persons*, Cmd. 3051, London 1966, proposes a broad reform of the illegitimate child's right of inheritance that would grant a right of intestate succession with regard to the father as well as the mother.²⁷ In New Zealand, the position of the illegitimate child, at least in the area of public law, has been made largely equivalent to that of the legitimate child. 4 Robson, BRITISH COMMONWEALTH, *New Zealand* 333 (1954).

Many countries of Latin America have provisions for legal equality of legitimate and illegitimate children. For example, the *Bolivian* constitution provides that "inequalities among children are not recognized; they all have the same rights and duties." Constitution art. 183 (Pan American Union, *Constitution of the Republic of Bolivia* 1961 (1963)). *Ecuador's* constitution gives the illegitimate rights of support and inheritance. Constitution art. 164 (Pan American Union, *Constitution of the Republic of Ecuador* 1946 (1961)). *Guatemala's* constitution provides that "(a)ll children are equal before the law and have identical rights" and that "(t)he law shall establish the means of proof in investigating paternity." Constitution art. 86 (2), (3) (Pan American Union, *Constitution of the Republic of Guatemala* 1965 (1966)). *Panama's* constitution provides that "Parents have the same duties toward children born out of wedlock as toward those born in it. All children are equal before

²⁷ See Lasok, *Family Law Reform in England*, 8 WM. & MARY L. REV. 589, 622 (1967); Stone, *Report of the Committee on the Law of Succession in Relations to Illegitimate Persons*, 30 MODERN LAW REVIEW 552 (1967).

the law and have the same hereditary rights in intestate succession." Constitution art. 58 (Pan American Union, *Constitution of the Republic of Panama 1946* (1962)). Uruguay's constitution contains the following provision: "Parents have the same duties toward children born outside of wedlock as toward children born within it." Constitution art. 42 (Pan American Union, *Constitution of the Republic of Uruguay 1967* (1967)).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the Court below should be reversed.

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